2007

Tangren Family Trust v. Rodney Tangren : Reply Brief

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

TANGREN FAMILY TRUST, by **RICHARD TANGREN**, Trustee and **RICHARD TANGREN**, Individually, Petitioner/Appellant, v. **RODNEY TANGREN** Respondent/Appellee.	)	Supreme Court No. **20070097-SC**

REPLY BRIEF OF APPELLANT

THIS IS AN APPEAL FROM THE GRANTING OF A PETITION FOR WRIT OF CERTIORARI ENTERED IN THE UTAH SUPREME COURT

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ORAL ARGUMENT/PUBLISHED OPINION REQUESTED

IN THE UTAH SUPREME COURT

TANGREN FAMILY TRUST, by **RICHARD TANGREN**, Trustee and **RICHARD TANGREN**, Individually,	)	
Petitioner/Appellant,	)	
	)	Supreme Court No. **20070097-SC**
v.	)	
RODNEY TANGREN	)	
Respondent/Appellee.	)	

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REPLY BRIEF OF APPELLANT

ARGUMENT

I. THE UTAH COURT OF APPEALS ERRONEOUSLY STRICTLY APPLIED THE PAROL EVIDENCE RULE AS DETERMINATIVE.

A. The Parol Evidence Rule Is Not Applicable When Determining the Existence of a Contract

In the *Brief of Appellee*, Rodney argues that the Utah Court of Appeals properly assessed and applied the parol evidence rule in the above-referenced matter. *Brief of Appellee* at p. 8. However, as argued further below, our appellate courts and our federal courts have determined that either the parol evidence rule does not apply since the trial court determined that the Lease was unenforceable; or, if the rule does apply, that parol evidence

is admissible to evidence any conditions placed by the parties upon the delivery and/or existence of the Lease.

This Court has long held that, "[e]vidence . . .attacking the existence of a written contract, . . . is admissible as an exception to the general rule prohibiting consideration of extrinsic evidence to alter or vary the terms of a written contract." Moody v. Smith, 9 Utah 2d 139, 141-142, 340 P.2d 83, 84-85 (Utah 1959). In Nielsen v. MFT Leasing, this Court reiterated that evidence that attacks the very existence of the contract for the purpose of proving it unenforceable does not contravene the parol evidence rule. *Ibid.*, 656 P.2d 454, 455 (Utah 1982), *citing* Nielsen v. Richter, 20 Cal.App.2d 546, 67 P.2d 353 (1937); Berta v. Rocchio, 149 Colo. 325, 369 P.2d 51 (1962); Lennen & Newell, Inc. v. Clark Enterprises, Inc., 51 Hawaii 233, 456 P.2d 231 (1969); Casentini v. Nevada National Bank, 88 Nev. 456, 499 P.2d 652 (1972). The 10th Circuit Court of Appeals has also determined that, ". . .the parol evidence rule does not apply to evidence introduced to show that a contract was void or voidable." Coleman v. Holecek, 542 F.2d 532 (C.A.10 Kan. 1976), *citing* Prophet v. Builders, Inc., 204 Kan. 268, 462 P.2d 122 (1969); 3 *Corbin on Contracts* § 573 at 359-60; § 580 at 438.

More specific to the case at hand, our 10th Circuit Court of Appeals has previously stated that, "[o]f course the law is well settled that as to contracts generally there can be a conditional delivery, and that the failure of the condition prevents the contract from taking effect. So, also, it may be conceded that whether there has been absolute or conditional delivery of a written contract may be shown by parol evidence." Sottong v. Magnolia

Petroleum Co., 162 F.2d 811, 813 (C.A.10 1947). The 10th Circuit determined that these principles were so well-established that it was unnecessary for them to cite authorities in support. *Id.* Colorado[1] has determined this type of conditional delivery to be akin to a separate contract in and of itself, terming it a "contract of conditional delivery," finding that neither the Negotiable Instrument Act nor the statute of frauds requires such to be in writing. Norman v. McCarthy, 56 Colo. 290, 295, 138 P. 28, 30 (Colo. 1913).

This Court has taken a similar position to the 10th Circuit and has undertaken an extensive analysis of this issue, stating as follows:

> It is well settled in this state that an oral agreement made prior to or contemporaneous with the execution of a written contract that such written instrument is delivered on the express agreement that it shall not become effective except on the happening of a certain contingency, and that the contingency has not happened to give effect to the written contract, may be shown in defense in an action on the written contract. The rule is clearly stated in Parker v. Weber County Irr. Dist., 65 Utah, 354, 236 P. 1105, 1107, as follows:
>
> > "It certainly is no longer an open question in this jurisdiction, if it is anywhere, that where a written instrument, regardless of its nature or conditions, is delivered upon the express agreement or

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[1] The Colorado court provided a helpful illustration of this position, as follows:
To illustrate: A man may make, sign, and acknowledge an instrument in form a complete deed to real estate and lay it in his desk, thinking that he may deliver it to the grantee on the morrow. During the night, he may conclude that he will not make the deed, and, on going to his desk in the morning, he finds that the deed had been stolen. It was not a deed, for one essential element to make it such was lacking, namely, delivery. In an action to set aside the apparent deed, it could not be said that parol testimony as to the facts would contradict or vary a deed or contract. It would merely show that what appeared to be a deed was in fact not one for the want of an essential element, which could not appear on the face of the deed.
Ibid. at 294-295.

> understanding by the parties that the instrument shall not become effective except upon the happening of a certain event or not until some act or condition shall have been performed, the instrument does not become effective until the happening of the event or performance of the act or condition. Moreover, the conditional delivery may always be shown by parol. *See* Central Bank v. Stephens, 58 Utah, 358, 199 P. 1018, and cases there cited both from this and other jurisdictions. Such evidence does not vary the terms of the contract, but it merely shows when the same became effective."

The rule and the distinctions indicated by the adjudicated cases are set forth in 22 C. J. 1148:

> "It has been frequently asserted that parol evidence is admissible to show the existence of some contingency or condition affecting the operation and effect of a written instrument; but on the other hand there are a great many cases holding that parol evidence is not admissible for such purpose. These two lines of authorities, while on their face conflicting, may be to a great extent reconciled by the reasonable assumption that the courts in making the decision one way or the other had in mind, although they may not have clearly expressed, the true distinction, which is this: The rule excluding parol evidence has no place in any inquiry unless the court has before it some ascertained paper beyond question binding and of full effect, and hence parol evidence is admissible to show conditions relating to the delivery or taking effect of the instrument, as that it shall only become effective upon certain conditions or contingencies, for this is not an oral contradiction or variation of the written instrument but goes to the very existence of the contract and tends to show that no valid and effective contract ever existed; but evidence is not admissible which, conceding the existence and delivery of the contract or obligation, and that it was at one time effective, seeks to nullify, modify, or change the character of the obligation itself, by showing that it is to cease to be effective or is to have an effect different from that stated therein, upon certain conditions or contingencies, for this does vary or contradict the terms of the writing."

See, also, Parker v. Weber County Irr. Dist. (Second appeal), 68 Utah, 472, 251 P. 11; *Hanson v. Greenleaf*, 62 Utah, 168, 218 P. 969; 22 C. J. 1245; 10

R. C. L. 1055; 4 Page on Contracts, § 2178; 2 Page on Contracts, Supp., § 2178. The same doctrine is concisely stated in Restatement, Contracts, § 241, at p. 340, as follows:

> "Where parties to a writing which purports to be an integration of a contract between them orally agree, before or contemporaneously with the making of the writing, that it shall not become binding until a future day or until the happening of a future event, the oral agreement is operative if there is nothing in the writing inconsistent therewith."

Nuttall v. Berntson, 83 Utah 535, 30 P.2d 738, 740-741 (Utah 1934). This Court ultimately determined in Nuttall as follows:

> Having admitted the execution of the contract, it was proper for defendants to allege as new matter that the contract had never become effective or binding because of an oral agreement to the effect that it should not become effective until and unless plaintiff was approved as subcontractor by the state building commission, and that such approval was never given.

Id., *citing* 49 C. J. 294; Eucalyptus Growers Ass'n v. Orange County N. & L. Co., 174 Cal. 330, 163 P. 45; Lord v. Miller, 86 Wash. 436, 150 P. 631; *Phillips, Code Pleading*, § 238; 1 *Bancroft, Code Pleading*, § 266.

In another analysis of this issue, this Court recognized the elementary nature of the holdings discussed *supra*, stating as follows:

> It is elementary that, as between the parties thereto, the terms of a written instrument may not be varied in any material part by parol evidence. It is, however, equally elementary that there are well-recognized exceptions to the rule, which are to the effect that, if a written instrument is delivered upon an express condition, and is not to be effective until the condition is fulfilled, the condition upon which it was delivered, or in case of fraud, etc., as between the parties, and as to those having notice thereof, may be shown by parol, and the effect of merely doing that is not to vary the terms of the written instrument.

Central Bank of Bingham v. Stephens, 58 Utah 358, 199 P. 1018 (Utah 1921). This Court cited cases encompassing 28 states, the federal courts, and the courts of England and Canada in support of its position, listing each in detail, but citing one in particular which is instructive. This Court recognizing as follows:

> In 22 C. J. 1153, after stating the general rule that parol evidence is inadmissible to vary the terms of a written instrument, it is said:
>
> > "But it may be shown, as between the parties or others having notice, that the delivery was conditional only, and that the instrument never in fact came into force as a binding obligation."

Id. This stands for the proposition that, absent meeting the conditions of delivery, the instrument does not create a binding obligation on the parties to said instrument.

In a case relied upon by Rodney in his brief, this Court determined that the parol evidence rule does not ". . .prevent proof that a party did not perform an obligation which it was understood and agreed by the parties was a condition precedent to the contract becoming effective." FMA Financial Corp. v. Hansen Dairy, Inc., 617 P.2d 327, 329 (Utah, 1980). In 8 *G. Thompson, Real Property* § 4238 (1963) it is stated that, "[p]arol evidence is always competent to show whether a deed has become operative by delivery, though such evidence is not competent to control its construction if it has once taken effect." *Ibid., see also* 23 Am.Jur.2d *Deeds* § 168. This Court set forth guidelines for our appellate determinations in matters such as these, stating with clarity as follows:

> "It certainly must be conceded that it was competent for the parties to stipulate when and upon what conditions their proposed contract should become operative and take effect, and could have conditioned it upon delivery of the contract, payment of premiums, some fixed time, or any other reasonable condition; and when the parties have done so, in such clear terms as here, courts should not seek means to contravene and frustrate the terms of such stipulations, and thereby defeat the intention of the parties, thus plainly expressed."

White v. Metropolitan Life Ins. Co., 63 Utah 272, 224 P. 1106, 1107 (Utah 1924), *citing* Sterling v. Head Camp, Pacific Jurisdiction, 28 Utah 505, 520, 80 Pac. 375, 380 (Utah 1905). "Moreover, the conditional delivery may always be shown by parol." Parker v. Weber County Irr. Dist., 65 Utah 354, 236 P. 1105, 1107 (Utah 1925).

In the instant matter, the Lease was not to become effective until Richard's death or an attempted take over of the property by the siblings of Rodney. During their work on the property, Rodney continually voiced his concern to Richard that if he worked on the property and then started making money that his six siblings would then get together and collude and take this ranch away from him and kick him out lock, stock and barrel and leave him with nothing. Tr. Vol. I at p. 52. For this purpose, Richard contacted his own attorneys to draw up some kind of agreement to stop the six siblings from taking the ranch from Rodney. *Id.* at pp. 52-53. When Richard's attorneys proposed a lease, Richard did not want to do it, but they told him it was the only legal document that would accomplish the task. *Id.* at p. 53.

Richard testified that the Lease was signed by him and signed by Rodney, but that he retained the only copy and did not give Rodney a copy of it. Tr. Vol. I at p. 55. Richard told

Rodney that he was not giving him a copy of the lease because it was only a stop-gap measure to prevent the six siblings from "ganging up" on him in the future. Tr. Vol. I at pp. 55, 105. Richard testified that he kept the Lease in a place where the people running his estate when he died would find it and determine whether to destroy it or execute it for the purpose under which it was created. *Id.* at pp. 105-106. Richard testified that he first put the Lease in his files at his fencing company office, then moved the files to a storage trailer next to the fencing company. *Id.* at p. 57. Richard testified that he did not see the Lease again until the year 2001. *Id.* at p. 58. On July 19, 2001, after a falling out with Richard, Rodney found and recorded the Lease with the San Juan County Recorder. *Id.* at p. 58; R009. Rodney failed to provide Richard with a copy of the recorded Lease, but simply told him that he had gone to the county, recorded the Lease, and wanted Richard to "get out and stay out." Tr. Vol. I at pp. 58, 68.

Richard clearly testified at the trial in this matter that his understanding of the drafting of such a lease was for the purpose of keeping the other children from being able to come in and take the ranch from Rodney. Tr. Vol. I at p. 51-55. Richard communicated this purpose to Rodney, that it was a stop gap measure--and not a lease--that would prevent his sibling from taking the ranch from him in the future. Tr. Vol. I at p. 104. Moreover, Richard understood that it was only to be used in the event of his passing away. Tr. Vol. I at pp. 105-106.

Although Rodney fails to ever mention throughout these proceedings that he was aware of the intent behind the creation of the Lease, he conceded on the witness stand that he knew it was only to protect him from his brothers and sisters and would come into effect only if something happened to Richard. Tr. Vol. II at pp. 19-20. Rodney additionally testified that, as long as Petitioner was living, ~~Respondent~~ did not anticipate his siblings attempting to take the ranch. *Id.*

The parties conceded under oath that a "contract for conditional delivery" was created. They both agreed under oath that the Lease was only a stop-gap measure to ensure that Rodney would be entitled to the property upon the death of Richard if his siblings tried to take the property from him. Richard retained the only copy of the Lease and told Rodney that he could not have it or record it. Richard maintained it with other papers that would pertain to his estate at his passing since its purpose would only occur upon his passing away. Richard never "delivered" the Lease to Rodney, but rather Rodney obtained it from Richard's files and recorded it after being erroneously advised by an attorney that it was appropriate for him to do so.

This behavior is similar to the Colorado court's illustration contained in footnote "1" *supra*. The element of delivery cannot be met in this matter and is not something that would appear on the face of the Lease. Thus, it cannot contravene the writings and evidence pertaining to the delivery of the Lease is admissible. *See*, Norman v. McCarthy, 56 Colo. 290, 295, 138 P. 28, 30 (Colo. 1913).

Delivery of the Lease was never effectuated, thus the Lease never came into force as a binding obligation on the parties. *See*, Central Bank of Bingham v. Stephens, 58 Utah 358, 199 P. 1018 (Utah 1921), *citing* 22 C.J. 1153. If such an analysis requires application of the parol evidence rule, in 8 *G. Thompson, Real Property* § 4238 (1963) it is stated that, "[p]arol evidence is always competent to show whether a deed has become operative by delivery. . ." As this Court previously held, the parol evidence rule does not ". . .prevent proof that a party did not perform an obligation which it was understood and agreed by the parties was a condition precedent to the contract becoming effective." FMA Financial Corp. v. Hansen Dairy, Inc., 617 P.2d 327, 329 (Utah, 1980). Both parties testified that it was understood that the Lease was simply to protect Rodney in the event of Richard's death and struggles with his six siblings over the property. This was the basis of the determination of the trial court in this matter; however, the Utah Court of Appeals erroneously strictly applied the parol evidence rule in contravention to prior precedent and overturned the trial court's correct analysis and determination that was well-supported by the facts of the case and the applicable law.

Even if it can be said that Richard delivered the Lease to Rodney, such delivery was obviously conditional based upon both parties' testimonies respecting the conditions upon which it would become enforceable. *See*, Sottong v. Magnolia Petroleum Co., 162 F.2d 811, 813 (C.A.10 1947). As the 10th Circuit stated, failure of the condition prevents the contract from taking effect, and evidence pertaining to whether there has been absolute or conditional

delivery of a written contract may be shown by parol evidence. *Id.* Thus, even if delivery did occur, an oral agreement was made prior to the Lease even coming into existence that two (2) conditions would occur before the Lease would be recorded and enforceable: (1) Richard would pass away; and (2) the six siblings would attempt to take possession of the property from Rodney. Since neither of these conditions have yet to occur in this matter, the Lease is prevented from taking effect and is inoperative. *See*, 8 *G. Thompson, Real Property* § 4238 (1963), *see also* 23 Am.Jur.2d *Deeds* § 168.

B. The Parol Evidence Rule Is No Longer Strictly Applied in Utah

In *Brief of Appellee*, Rodney attempts to argue that the parol evidence rule as applied by the Court of Appeals is well grounded in Utah law. *Brief of Appellee* at p. 13. Rodney is mistaken in this argument, as argued below, the parol evidence rule is no longer strictly applied in Utah.

In Gillmor v. Macey, 2005 UT App 351, 121 P.3d 57, the Utah Court of Appeals undertook an extensive analysis of the parol evidence rule, in reliance on this Court's decision in Ward v. Intermountain Farmers Ass'n, 907 P.2d 264, 268 (Utah 1995), and Nielsen v. Gold's Gym, 2003 UT 37 ¶7, 78 P.3d 600, providing as follows:

> Under Utah law, if the initial review of the plain language of a contract, within its four corners, reveals no patently obvious ambiguities, the inquiry into whether an ambiguity exists in a contract does not always end there. Utah's rules of contract interpretation allow courts to consider any relevant evidence to determine whether a latent ambiguity exists in contract terms that otherwise appear to be unambiguous. See Ward v. Intermountain Farmers Ass'n, 907 P.2d 264, 268 (Utah 1995) ("When determining whether a contract is

ambiguous, any relevant evidence must be considered.") *see also* Nielsen v. Gold's Gym, 2003 UT 37 ¶7, 78 P.3d 600 (stating that any "[r]elevant, extrinsic evidence 'of the facts known to the parties at the time they entered the [contract]' is admissible to assist the court in determining whether the contract is ambiguous") (second alteration in original) (citation omitted). **[FN14]** In adopting this approach to the interpretation of contracts and contract ambiguities, the Utah Supreme Court has reasoned that "[o]therwise, the determination of ambiguity is inherently one-sided, namely, it is based solely on the 'extrinsic evidence of the judge's own linguistic education and experience.'" Ward, 907 P.2d at 268.(citations omitted) Therefore, [a]lthough the terms of an instrument may seem clear to a particular reader--including a judge--this does not rule out the possibility that the parties chose the language of the agreement to express a different meaning. A judge should therefore consider any credible evidence offered to show the parties' intention. *Id. See also* Nielsen, 2003 UT 37 at ¶ 7, 78 P.3d 600. Thus, a " '[r]ational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties ... so that the court can "place itself in the same situation in which the parties found themselves at the time of contracting." ' " Ward, 907 P.2d at 268 (second alteration in original) (citations omitted).

Utah no longer strictly applies the "parol evidence rule" or the "plain meaning rule," which exclude the use of any parol evidence to show whether a contract's language lacks the required degree of clarity. *See* Ward v. Intermountain Farmers Ass'n, 907 P.2d 264, 268 (Utah 1995) ("While there is Utah case law that espouses a stricter application of the [parol evidence] rule and would restrict a determination of whether ambiguity exists to a judge's determination of the meaning of the terms of the writing itself, [*see, e.g.,* Bakowski v. Mountain States Steel, Inc., 2002 UT 62,¶ 16, 52 P.3d 1179,] the better-reasoned approach is to consider the writing in light of the surrounding circumstances."). *See generally* 2 Farnsworth § 7.12; 5 Margaret N. Kniffin, Corbin on Contracts § 24.7 (rev. ed.1998) (discussing the various views courts have on how the parol evidence and plain meaning rules should be applied in contract interpretation). Instead, Utah law has made these rules of interpretation just part of the initial inquiry to determine whether an ambiguity exists in contract language. They are no longer the determinative rules they once were when parties asserted that a contract contained ambiguities. *See* Ward, 907 P.2d at 268; Nielsen v. Gold's Gym, 2003 UT 37,¶ 7, 78 P.3d 600. [a]lthough the terms of an instrument may seem clear to a particular reader-

> including a judge-this does not rule out the possibility that the parties chose the language of the agreement to express a different meaning. A judge should therefore consider any credible evidence offered to show the parties' intention. *Id. See also* Nielsen, 2003 UT 37 at ¶ 7, 78 P.3d 600. Thus, a " '[r]ational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties ... so that the court can "place itself in the same situation in which the parties found themselves at the time of contracting." ' " Ward, 907 P.2d at 268.

Gillmor v. Macey, 2005 UT App 351, FN 14, 121 P.3d 57

"While there is Utah case law that espouses a stricter application of the rule and would restrict a determination of whether ambiguity exists to a judge's determination of the meaning of the terms of the writing itself, the better-reasoned approach is to consider the writing in light of the surrounding circumstances (citations omitted)." [R]ational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties ... so that the court can 'place itself in the same situation in which the parties found themselves at the time of contracting.' " Pacific Gas & Elec. Co., 69 Cal.Rptr. at 565, 442 P.2d at 645 (*quoting* Universal Sales Corp. v. California Press Mfg. Co., 20 Cal.2d 751, 128 P.2d 665, 672 (1942).

Rodney also cites the case of FMA Financial Corp v. Hansen Dairy, Inc., 617 P.2d 327, (Utah, 1980) in an attempt to support their position. *Brief o Appellee* at p. 13. In FMA, the parties had a written agreement for a silo to be installed on Hansen's property, but in addition to the written agreement, they also had a verbal agreement that the silo would be installed prior to harvesting, and both understood that the agreement could not become

effective until the silo was installed. The agreement that the silo be installed prior to harvesting was not included in the written agreement. However, because it was such a pertinent fact to the written agreement, the courts found in favor of the defendant in spite of the fact, that the separate, essential verbal agreement was not ever written in the signed contracts of the parties. This case is very similar to the instant matter.

In this case, Richard and Rodney had a verbal agreement and understanding that the lease was for the purpose of protecting Rodney from his siblings' possible attempt to take over the property and that the lease would not come into effect until the death of Richard. The fact that both parties testified that this was their understanding when they entered the agreement makes it an unarguable and undisputed fact, thus clearly showing this Court that there was, similarly to FMA, a separate agreement between the parties. Moreover, the agreement of the parties as to the effective date as well as the purpose of the lease is a highly essential fact to this case. Furthermore, the trial court recognized that the purpose of the agreement and its effective date of the lease were essential to determining the existence of a contract and therefore, based upon this fact determined that a binding contract had never existed. R 0130. The court in this matter did not find that any lease existed. Without the existence of a lease, there can be no question as to integration or ambiguity because no lease exists to require determination of these two (2) factors. Because the trial court found that no lease existed, the trial court did not determine whether or not parol evidence was admissible. In order to submit parol evidence you must have a contract, without such contract there is no

need for parol evidence. The existence of a contract is a threshold issue to undertaking any analysis of the parol evidence rule.

Richard testified at the trial in this matter that his understanding of the drafting of the lease was for the purpose of keeping the other children from being able to come in and take the ranch from Rodney. Tr. Vol. I at p. 51-55. Furthermore, he testified that he reiterated to Rodney what the purpose of the lease was, that it was not a lease, but a stop gap measure that would prevent his siblings from taking the ranch from him in the future. Tr. Vol. I at p. 104. Moreover, Richard understood that it was only to be used in the event of his passing away. Tr. Vol. I at pp. 105-106.

Rodney also testified that the purpose of the lease was to protect him from his brothers and sisters and would come into effect only if something happened to Richard. Tr. Vol. II at pp. 19-20. Rodney additionally testified that, as long as Richard was living, Rodney did not anticipate his siblings attempting to take the ranch. *Id.* None of the testimony submitted by either of the parties was disputed. Therefore, their testimony should be admissible to determine the very existence of the contract, which, in this case does not exist because the conditions were not met in this case, as argued further *supra*. The trial court correctly analyzed the evidence with regard to the Lease and concluded that the contract was not binding or enforceable.

C. Parol Evidence is Admissible as it Pertains to the Date of the Lease.

In the *Brief of Appellee*, Rodney argues that Richard's argument has a fundamental flaw in that the Lease provided Rodney with the use of the property from February 24, 1994, until February 28, 2090, and therefore the parol evidence converts the Lease into a testamentary documents and "clearly contradicts a clear and explicit term of the Lease and thus is thus violative of the parol evidence rule." *Brief of Appellee* at p. 26. However, Rodney fails to support such a contention with any legal authority pertaining specifically to the date of the Lease. Such failure becomes clear when a legal analysis rather than just a persuasive one is undertaken.

As previously recognized by this Court, parol evidence is admissible as it pertains to the date contained on an instrument, this Court's analysis as follows:

> 'An exception is recognized to the parol evidence rule in the case of dates upon instruments. It is said that the rule that parol evidence cannot be received to contradict a written contract *does not apply to the date, which may be contradicted whenever it is material to the issues to do so*, or, if lacking, may be supplied by parol or other competent testimony. . .'

Olsen v. Reese, 114 Utah 411, 417-418, 200 P.2d 733 (Utah 1948)(emphasis added), *citing* American Jurisprudence, Vol. 20, Evidence, p. 977. This Court recognized that, "[t]he authorities are practically unanimous to the effect that parol evidence is competent to establish the true date of execution and delivery of the contract regardless of the fact that it differs from the date shown in the body of the contract." *Id.* at 417.

Clearly the date of the Lease is material to the issues in this matter since both parties have indicated that two conditions were placed upon the effectiveness of the Lease pertaining to the date. As argued *supra*, it is questionable whether a valid delivery even occurred in this matter. However, regardless of the validity of the delivery, such delivery must at least be considered conditional in light of the testimony offered by both parties at trial. Since the Lease could not be effective until delivery, however, Rodney's argument that it became effective on February 24, 1994, evidences the contradictions not only in the Lease itself, but in the testimony offered by Richard and Rodney.

Besides the date Rodney conclusively determined in his own favor as the "effective date," the Lease itself also sets forth a separate commencement date of March 1, 1994. R010. The evidence offered at trial by the parties indicates that the Lease was not "delivered to," recorded or enforced by Rodney until February 21, 2001. R009. The only way in which to reconcile the differing dates of the Lease itself and the non-parol evidence testimony offered at trial respecting the recording date of the Lease is to allow parol evidence regarding the parties intent in entering into it. Such evidence, as argued *supra*, clearly shows that the Lease is not yet to be effective since the two threshold conditions have not occurred. Parol evidence is not only admissible respecting this matter, but necessary based on the contradictions contained within the Lease itself.

Alternatively, as argued *supra* it appears that the date of February 24, 1994, is the date on which the parties entered the agreement, but nothing in the Lease states that they

intended for that date to be the date upon which the lease was effective. The Lease itself simply states, "Lease Agreement ("Lease" or "Agreement") made on February 24, 1994, by and between Richard Tangren, Trustee of Tangren Family Trust (hereinafter called "Lessor") and Rodney Tangren (hereinafter called "Lessee")." R009. The March 1, 1994 date is found under subsection "3" of the Lease on p. 2, and states, "**Duration of Lease**: The term of this Lease shall commence on March 1, 1994, or upon delivery of possession, whichever occurs first,. . ." *Id.* This portion of the Lease only indicates the duration of the Lease, so as to affix a time in which the ninety-nine (99) years would run. It appears that, because the effective date of the Lease was upon recording of the Lease, which was to occur after Richard's death and upon the six siblings attempts to take over the ranch from Rodney, that this determination was made by mutual consent and the trial court was correct in its initial determination that the Lease should not yet be effective. Such evidence is admissible since the date upon which the Lease was to become effective is at issue and material. *See*, Olsen v. Reese at 417-418.

II. ALTERNATIVELY, SHOULD THIS COURT FIND THAT PAROL EVIDENCE APPLIES, THEN THE PARTIES TESTIMONY EVIDENCE AN ISSUE WITH THE INTEGRATION CLAUSE.

This Court undertook a similar analysis to the instant matter as it pertains to the admissibility of parol evidence regarding a conditional delivery, stating in pertinent part as follows:

> It certainly is no longer an open question in this jurisdiction, if it is anywhere, that where a written instrument, regardless of its nature or conditions, is delivered upon the express agreement or understanding by the parties that the

> instrument shall not become effective except upon the happening of a certain event or not until some act or condition shall have been performed, the instrument does not become effective until the happening of the event or performance of the act or condition. Moreover, the conditional delivery may always be shown by parol. *See Central Bank v. Stephens*, 58 Utah, 358, 199 P. 1018, and cases there cited both from this and other jurisdictions. Such evidence does not vary the terms of the contract, but it merely shows when the same became effective. The district court therefore erred in excluding defendant's evidence, which was offered to prove that, although the notice was served, it was nevertheless agreed between the deceased and the district that it should not become effective until the loan was obtained.

Parker v. Weber County Irr. Dist., 65 Utah 354, 236 P. 1105, 1107 (Utah 1925). Utah employs a two-step process in interpreting contracts. In re Armstrong, 292 B.R. 678 (10th Cir.BAP (Utah),2003), *citing* Hall v. Process Instruments & Control, Inc., 890 P.2d 1024, 1027 (Utah 1995). The first step is to determine whether the agreement is integrated. *Id.* An integrated agreement is a writing " 'which in view of its completeness and specificity reasonably appears to be a complete agreement ... unless it is established by other evidence that the writing did not constitute a final expression.' " *Id.* (*quoting* Union Bank v. Swenson, 707 P.2d 663, 665 (Utah 1985) (further citation omitted)). There is a rebuttable presumption that an agreement is integrated. Union Bank, 707 P.2d at 665. Under the parol evidence rule, extrinsic evidence will be admissible to show that an agreement is not integrated. *Id.*

The parol evidence in the instant matter does not vary the terms of the contract, but simply shows when such terms were to become effective; to wit: (1) upon the death of Richard, and (2) upon the six siblings attempting to take the ranch from Rodney. If those

conditions never occurred, the Lease was never to become effective. Richard testified that he did not intent Rodney to have a copy of the Lease for this reason, but that the copy would remain where the person dealing with his estate after his death would know whether the appropriate conditions had been met to either record the Lease or destroy it. Such matters were conditions placed upon the creation of the Lease.

The integration clause at issue in this matter is contained in section "17" of the Lease, and states that, "**Entire Agreement:** This Lease contains the entire understanding between the parties with respect to its subject-matter, the Property and all aspects of the relationship between Lessee and Lessor." R014. The Utah Court of Appeals erroneously based its determination that the Lease was fully integrated on Richard's testimony respecting the intent of the Lease, failing to acknowledge that Rodney similarly testified. Tangren Family Trust ex. rel. Tangren v. Tangren, 2006 UT App 515, ¶9, 154 P.3d 380. The Utah Court of Appeals found that Richard had not overcome the presumption of integration since the preference for determining the intent of the contracting parties should be gleaned, whenever possible, "from written documents rather than from self-serving testimony." *Id.* Clearly the Utah Court of Appeals failed to take into consideration all of the evidence presented at the

trial in this matter[2]. Having done so, it erroneously determined that the integration clause evidenced integration in the Lease and found that parol evidence would only be admissible if an ambiguity existed.

The alleged parol evidence in the instant matter evidences that the Lease did not constitute a final expression. Union Bank at 665. This extrinsic evidence is admissible to show that the Lease is not integrated. *Id.* When such evidence is conceded to from both sides of the case, it should be considered admissible. Such consideration would not contravene the parol evidence rule which works to protect one individual from another's contested interpretation of the contract itself. Neither party is contesting that the conditions exist. Such conditions necessarily evidence a flaw in the integration clause of the Lease since it is clear that both parties believe that the Lease should not have been effective until the conditions were met.

Should this Court determine that the evidence presented is subject to the parol evidence rule, such evidence should clearly be deemed admissible to support the purpose

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[2] Richard argued below that Rodney's challenge to the sufficiency of the trial court's determination required marshaling of the evidence and that they had failed to meet such a burden; however, the Utah Court of Appeals' decision in the matter declined to address the marshaling requirement. Clearly, had the Utah Court of Appeals addressed the marshaling requirement, it would not have believed Rodney's version of the facts as conclusive and would have recognized that Rodney offered the same testimony which the Utah Court of Appeals deemed as "self-serving" in its determination as to Richard's testimony. Such failure to address a long-standing requirement from both case law and the Utah Rules of Appellate Procedure created a flaw in the Utah Court of Appeals' determination on this issue.

behind the rule itself. Black's Law Dictionary, abridged 6th Edition, West Publishing Company, 1991 defines the Parol Evidence Rule as:

> This evidence rule seeks to preserve integrity of written agreements by refusing to permit contracting parties to attempt to alter import of their contract through use of contemporaneous oral declarations. Under this rule when the parties to a contract embody their agreement in writing and intend the writing to be the final expression of their agreement, the terms of the writing may not be varied or contradicted by evidence of any prior written or oral agreement in the absence of fraud, duress or mutual mistake. But rule does not forbid a resort to parol evidence not inconsistent with the matters stated in the writing. Also, as regards sales of goods, such written agreement may be explained or supplemented by course of dealing or usage of trade or by course of conduct, and by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

The integrity of the Lease is not undermined by the admission of both parties' testimonies in this matter respecting the conditions placed on the effective date of the Lease. Such concession by the parties under oath could clearly meet the requirements of evidencing "mutual mistake" in the inclusion of the integration clause of the Lease.

Clearly the Lease is not fully integrated, even in light of the integration clause contained therein, given the testimony of the parties in this matter. To best serve the ends of justice, the integration clause of the Lease cannot be upheld as conclusive to the issue of integration in this matter. The extrinsic, or parol evidence of the parties' concession to the conditions placed upon the effectiveness or recording of the Lease should be considered admissible to evidence a lack of integration in the Lease.

CONCLUSION

WHEREFORE, based upon the foregoing and for good cause otherwise shown, Appellant hereby requests that this Court reverse the decision of the Court of Appeals and uphold the trial courts decision in this matter.

DATED THIS 20th day of August, 2007.

Craig C. Halls
Attorney for the Petitioners/Appellants

CERTIFICATE OF MAILING

I hereby certify that on the 20th day of August, 2007, I mailed, first class, postage prepaid, two true and correct copies of the foregoing *Reply Brief of Appellant* to the following:

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